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In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF GOVERNOR GEORGE F. ALLEN AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONERS

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PERMISSION TO FILE BRIEF AS AMICI CURIAE

Governor George F. Allen and the Commonwealth of Virginia file this brief as *amici curiae* on behalf of the Petitioners, pursuant to Rule 37.5 and that certain letter lodged with the Court, dated December 6, 1994, by which counsel for the parties evidenced their joint, blanket consent to the filing of briefs by *amici curiae* in this case.

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INTERESTS OF AMICI CURIAE

Governor George F. Allen and the Commonwealth of Virginia (collectively, "the Commonwealth")[1] are deeply

[1] These *amici curiae* are represented by the Attorney General of Virginia, James S. Gilmore, III, and his assistants designated herein. The Rector and Visitors, et al., are represented by James J. Mingle, a Special Assistant Attorney General and General Counsel to the University, and John C. Jefferies, Jr., Professor at the School of Law. This arrangement of counsel for

mindful of the efforts of our ancestors in securing for us freedom of speech, freedom of the press and freedom of worship. It is of great concern that the University of Virginia, an institution founded by Thomas Jefferson, has been shown to have a policy of funding student publications that discriminates against students wishing to espouse religious viewpoints and that may have the practical effect of suppressing such views. The Commonwealth's concern is particularly acute because the University is a state-supported institution of higher learning with a Board of Visitors appointed by the Governor. This brief is filed by these *amici*, in support of the Petitioners, in the interest of vindicating the liberties of these students, and any others who may be subject to similar discrimination. It is also filed in the interest of establishing a clear rule of law that would remove any possible confusion about what the Constitution requires of the University of Virginia and other state-supported institutions of higher learning. And it is filed to vindicate the original intention of the University's founder that it function as a forum for the free and unfettered exchange of ideas and the pursuit of knowledge.

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different parties within state government is expressly authorized by Va. Code § 2.1-121, "The Attorney General, in his discretion, may represent personally or through one or more of his assistants any number of state departments, institutions . . . entities [or] officials . . . which are parties to the same transaction or which are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution . . . or entity."

SUMMARY OF ARGUMENT

When Thomas Jefferson departed this life on July 4, 1826, he left behind instructions for this inscription to be placed on his gravestone:

HERE WAS BURIED
THOMAS JEFFERSON
AUTHOR OF THE DECLARATION OF
AMERICAN INDEPENDENCE,
OF THE STATUTE OF VIRGINIA
FOR RELIGIOUS FREEDOM, AND
FATHER OF THE UNIVERSITY OF VIRGINIA

12 Paul L. Ford, *The Works of Thomas Jefferson* at 483 (1905).

This epitaph is remarkable in that Mr. Jefferson esteemed these accomplishments more highly than his service as Governor of Virginia, or his two terms as President of the United States, achievements he chose not to mention. Now, more than a century and a half later, two of his most cherished accomplishments are intermeshed in a landmark controversy before this Court. What this case is about, in large measure, is whether Mr. Jefferson's University must abandon its commitment to free inquiry in order to abide by the principles embodied in his Statute for Religious Freedom and, later, in the First Amendment.[2]

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[2] "[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947).

There is no doubt that the University has a perfect right not to aid *any* student newspapers. It may, if it so chooses, withhold its resources and leave its students free to publish or not, depending on their ability to find a press or raise funds by other means. The University has chosen not to follow this course. Instead, it has elected to devote a small portion of its resources to the printing of student publications. What is at issue here is whether, having made this choice, the University may refuse to print a particular student newspaper because it deems the students' views to be excessively religious.

The Discriminatory Policy Of The Rector And Visitors Is Presumptively Unconstitutional.

The Rector and Visitors argue that, under the Constitution, the University not only may – but that it must – refuse to give funding for printing the religious views of *Wide Awake*. The Commonwealth contends that such discrimination is *not* required by the Constitution – indeed, that it is forbidden – and that it distorts the ideal of free inquiry and open debate to which the University was dedicated by its founder.

The Fourth Circuit Court of Appeals ultimately ruled in favor of the Rector and Visitors, but it did not agree with them on every point. The Court began by flatly *rejecting* the Rector and Visitors' suggestion that they be given "unlimited discretion" to determine the eligibility of student groups for funding. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 280 (4th Cir. 1994). Instead, the Fourth Circuit found that the "publication of

religious speech in *Wide Awake* falls within the protective ambit of the Speech and Press Clause." *Id.* The Court concluded that the current discriminatory policy is "presumptively unconstitutional" (*Id.* at 287) and would not be allowed to stand unless the University could show it is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 281. Up to this point, the Commonwealth has no disagreement with the Fourth Circuit and need not belabor the rationale supporting this part of the decision below.

Where the Fourth Circuit erred is in its conclusion that funding *Wide Awake*, even under a content-neutral policy, would violate the Establishment Clause, thereby necessitating the policy of discrimination. The Commonwealth believes that the Fourth Circuit egregiously misapplied the three-prong test set forth by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[3] This case may present an opportunity for the Court to follow the recent suggestions of several Justices and reconsider *Lemon*. Yet, as the Commonwealth will show, even under *Lemon*, the discriminatory policy of the Rector and Visitors is not necessary to avoid an Establishment Clause violation. Thus, there is no reason to curtail the protections afforded these students by the Speech and Press Clause of the First Amendment.

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[3] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. [F]inally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612 (citations omitted).

ARGUMENT

A. The University Of Virginia: A Marketplace Of Ideas.

In an 1820 letter to William Roscoe, Mr. Jefferson explained his vision for the University. In an eloquent statement, later inscribed in marble at the East entrance to the Grounds, he wrote:

> This institution will be based on the illimitable freedom of the human mind. For here, we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.

15 Lipscomb & Bergh, *The Writings of Jefferson* at 303.

The importance of avoiding an anti-religious bias at the University was very much on Thomas Jefferson's mind in November of 1822. In a letter to Dr. Thomas Cooper, he expressed his dismay that, because there was no Professorship of Divinity, some had accused the University of being "against all religion." Mr. Jefferson and his Board of Visitors sought to "silence that calumny" with a proposal to encourage *private* religious speech on the Grounds:

> [W]e suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other. This fills the chasm objected to ours, as a

> defect in an institution professing to give instruction in *all* useful sciences.

12 Paul L. Ford, *The Works of Thomas Jefferson* at 272 (emphasis in original).[4]

Mr. Jefferson understood that encouraging religious voices at the University would promote not only the pursuit of truth, but would also foster a spirit of toleration, particularly in those matters where truth is inherently elusive or where differences in opinion are rooted in profoundly different personal or historical experiences. In his letter to Dr. Cooper, Mr. Jefferson wrote:

> [B]y bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality.

12 Paul L. Ford, *The Works of Thomas Jefferson* at 272.

The need to "neutralize prejudices" is not limited to competing religious groups, but carries over to differences between religious and secular viewpoints. For example, a conservative-minded student from a small rural community may not be persuaded to espouse the agenda of the various social activists she is likely to

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[4] The plan outlined in Mr. Jefferson's letter to Dr. Cooper was incorporated into regulations adopted by the Board of Visitors in 1824. Those regulations provided in part, that "The students of such religious school, if they attend any school of the University, shall be considered as students of the University, subject to the same regulations, and *entitled to the same rights and privileges.*" Saul K. Padover, *The Complete Jefferson* at 1110 (emphasis added).

encounter at the University,[5] but she may very well come to understand that the issues confronting our society are more complex than she previously perceived. Similarly, the radical who reads *Wide Awake's* particular religious perspective may not change his goals, but he may come to understand that traditional social values are rooted in intellectually deeper ground than he previously supposed.

A devout Christian student is unlikely to convert to Islam upon reading *Al Salam*, a newspaper published by the University-funded Muslim Student Association.[6] Yet, to learn from the pages of that publication that Muslims recognize a line of prophets that includes Abraham and Moses, as well as Jesus, may very well help that student escape the antagonism that has divided these faiths from the time of the Crusades. The Jewish Law Student Association ("JLSA") also receives University funds. Although it has no publication, it includes non-Jews in its activities, including its Seders,[7] thereby cultivating a deeper respect for its ancient faith. As for *Wide Awake*, the confirmed

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[5] Groups funded by the University include Students for Animal Rights, Lesbian and Gay Student Union, Post-Conviction Project and Gandhi Peace Center. J.A. at 65.

[6] The Rector and Visitors contend that the Muslim and Jewish groups that it funds are not religious, but cultural, a ephemeral distinction discussed in more detail in Part D.

[7] The Seder is a ceremonial dinner commemorating the Exodus, held on the eve of the first day of Passover, pursuant to the injunction found in the Torah at Exodus 12:42 and Leviticus 23:4-6. Even if no University funds are spent directly on these celebrations, the use of University funds by JLSA for other organizational purposes contributes, if only indirectly, to the success of these religious events.

agnostic may not be led to a life of faith through the reading of *Wide Awake*, but he may come to appreciate why many committed Christians – from both the liberal and conservative branches of their faith – champion their respective causes in the public life of our country. A marketplace in which religious ideas are granted access equal to that afforded secular groups contributes to a spirit of toleration. In a diverse democratic society, such toleration is a virtue upon which civil peace – and hence our future as a nation – may well depend.

Mr. Jefferson's overarching vision for the University describes what has come to be known, in modern parlance, as a "marketplace of ideas." It is not an idea limited to Charlottesville, Virginia, but is a concept recognized by this Court as a vital part of higher education throughout the United States:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion of Chief Justice Warren).

The Jeffersonian ideal was again embraced by this Court in *Healy v. James*, 408 U.S. 169 (1972), when it said:

> The college classroom *with its surrounding environs* is peculiarly the "marketplace of ideas," and we break no new constitutional ground in

> reaffirming this Nation's dedication to safeguarding academic freedom.

408 U.S. at 180-181 (emphasis added).

Thus, it is not just the classroom where the marketplace of ideas is to be found, but wherever and however students seek out the views of others or seek to express their own. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, ___ U.S. ___, 112 S. Ct. 2701, 2705, 120 L. Ed. 2d 541, 549-550 (1992); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45-46 (1983) (the forum includes both the physical situs and "intangible channels of communication"). Indeed, the marketplace of ideas is found throughout the University community, or what Mr. Jefferson called the "academical village."

Establishing a marketplace of ideas within the University community plainly serves a legitimate secular purpose. This marketplace is enhanced when the University helps students meet their printing costs, and thus enables them to publish their ideas to the rest of the academic community.[8] Few would doubt that such enhancement occurs when the University gives aid to students wishing to publish secular ideas, or even anti-religious ones. Yet, if this is true, then the marketplace must also be enhanced when similar aid is given to students wishing

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[8] The Student Activity Fee Statement of Purpose and Funding Guidelines provides, in part: "The Rector and Visitors have determined that activities of the student organizations in the following categories relate to the educational purpose of the University and thus are eligible for funding . . . [4] student news, information, opinion, entertainment, or academic communications media groups." Plaintiffs' Ex. 3, Fourth Circuit App. at 74.

to express *religious* viewpoints. To hold otherwise is to presume that religious ideas are inherently inferior,[9] a prejudice that our jurisprudence and our history emphatically reject. "The Establishment Clause does not demand hostility to religion, religious ideas, religious people or religious schools." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, ___ U.S. ___, 114 S. Ct. 2481, 2498, 129 L. Ed. 2d 546, 570 (1994) (O'Connor, J., concurring). Indeed, as this Court has noted, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). *See also Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

Still, some may argue that there cannot be a *secular* purpose for aiding *religious* speech; but such an argument ignores the broad array of purposes that this Court has approved under the rubric of "secular." For example, in explaining its earlier decision to uphold tax exemptions for religious groups along with other non-profit organizations, this Court approved the view that religious groups advance such "secular objectives" as "contribut[ing] to

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[9] In an interview recently granted to the *Denver Post*, Tanisha Sullivan, a third year student at the University of Virginia, who makes decisions regarding the expenditure of student activity funds, explained how Christianity is viewed at the University of Virginia. "It raises an eye brow and you look at it a little more closely just because it is Christianity. Everyone is so on edge when it comes to Christianity. . . . My generation is taking a turn away from Christianity and trying to explore other things, trying to break away from the norm. When you have people like the Bakers and Jerry Falwell, my generation sees Christianity as money-grubbing, sort of a farce." James Gannon, "Christian Magazine Denied Funds." *Denver Post* (Nov. 8, 1994) at 5F.

the cultural and moral improvement of the community . . . *and enhanc[ing] a desirable pluralism of viewpoint. . . .*" *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2 (1989) (emphasis added) (discussing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970)). Helping the students of *Wide Awake* meet their printing costs would likewise enhance a desirable pluralism of viewpoint, and thereby advance a legitimate secular objective.

By encouraging secular and anti-religious voices, but not religious ones, the Rector and Visitors place limits on the "illimitable freedom of the human mind." Students are no longer encouraged to "follow truth *wherever* it may lead," but are discouraged from pursuing those paths that lead toward a Supreme Being. In short, the marketplace of ideas is distorted.

In trying to acquit the University from the charge that it inhibits religion, the Fourth Circuit said:

> The University's policy of allowing the members of Wide Awake Productions open access to campus facilities accords the plaintiffs ample opportunity to express their religious views, and leaves the University community as a whole free to read and consider them.

18 F.3d at 285.

The absence of actual suppression is not, however, the full measure of the University's constitutional obligations. In determining whether religious expression is inhibited, it is necessary to look at the rights granted to other students who espouse viewpoints with which *Wide Awake* must compete in the marketplace. All groups are apparently granted access to the same University-owned

equipment in preparing the content of their respective publications. But, while the Rector and Visitors then give fifteen other groups access to printing presses, by paying the printers' bills, they leave the students of *Wide Awake* to fend for themselves. Thus, while groups expressing secular or anti-religious views are free to write, edit and publish articles for their next issues, the students of *Wide Awake* must spend their time scrambling for money with which to pay the printer and keep their publication alive. Such a discriminatory policy inhibits the expression of religious viewpoints by leaving *Wide Awake* at a competitive disadvantage in the marketplace of ideas. In *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984), Justice O'Connor stated that government endorsement in violation of the Establishment Clause occurs when government sends a message to "nonadherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." In this case, the students espousing secular views are treated by the University as insiders, while students espousing religious viewpoints are treated as though they are not full members of the University community. Moreover, on an individual level, the current funding policy sends the message to aspiring student writers that, if they want the University to help print their work, they had better steer clear of religious advocacy and write about something the Rector and Visitors find more palatable.

Mr. Jefferson's plan for the University not to intrude upon the independence of religious groups, but to provide them every accommodation (*see supra* page 6) anticipated by 159 years the decision of this Court in *Widmar v.*

Vincent, 454 U.S. 263 (1981). There the Court required the University of Missouri to allow religious groups access to the same campus meeting rooms made available for other student groups. One reason for the decision was the need to guard against an anti-religious distortion of the marketplace of ideas, a concern implicit in the concurring opinion of Justice Stevens:

> It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.

Id. at 281.

Like the policy rejected in *Widmar*, the policy now in effect at the University of Virginia would allow young hedonists access to University resources for printing articles advocating an amoral lifestyle, and would permit student atheists similar assistance for publishing anti-religious diatribes. If the Student Activity Fee ("SAF") can be used for such ends, then students desiring to extol the virtues of a Christian lifestyle, or to comment favorably on the writings of St. Augustine, should not be barred from receiving comparable assistance. Mr. Jefferson and his original Board of Visitors wished to encourage such private religious speech by every

accommodation they could give them. The current Rector and Visitors should follow their example.

B. A Content-Neutral Policy Neither Advances Nor Inhibits Religion.

The central flaw in the argument of the Rector and Visitors is their claim that funding *Wide Awake* would have the primary effect of advancing religion, in violation of the second prong of the *Lemon* test. They reach this mistaken result because they focus on whether the funding of *Wide Awake, considered in isolation,* would have such an impermissible effect. But, as this Court has recognized, "[To] focus exclusively on the religious component of *any* activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). Instead, the test is whether funding *Wide Awake, under a content-neutral policy*, would have the primary effect of advancing or inhibiting religion. Rather than examine whether such a policy would have "the practical effect of aiding religion *in this particular case*," the Court must "look[ ] to the nature and consequences of the program *viewed as a whole.*" *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 492 (1986) (Powell, J., concurring) (emphasis in original).

A mistaken focus similar to that still exhibited by the Rector and Visitors was corrected by this Court more than a decade ago in *Widmar*. The University of Missouri argued that allowing religious groups to share in the use of those facilities, particularly for the purpose of worship,

would have the primary effect of advancing religion. This Court disagreed, and put the matter in proper perspective:

> The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

Widmar, 454 U.S. at 273 (internal citations omitted).

To paraphrase *Widmar*, the Rector and Visitors likewise misconceive the nature of the case. The question is not whether funding *Wide Awake* would violate the Establishment Clause. The University has made its resources available for printing the publications of student groups, and the question is whether it can now exclude certain groups because of the content of their publications. In this context, it cannot be said that the primary effect of a funding policy, open to all forms of printed discourse, would be to advance religion.

In adopting the position of the Rector and Visitors, the Fourth Circuit said "it would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship – and therefore advancement – of religious belief." 18 F.3d at 285. This bold assertion fundamentally

misperceives the nature of state sponsorship in a university setting. Again, *Widmar* supplies the correct perspective:

> [A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. . . . [S]uch a policy would no more commit the University . . . to religious goals than it is now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities.

Widmar, 454 U.S. at 274 (internal quotation marks and citations omitted). Similarly, a content-neutral funding policy would no more commit the University of Virginia to the religious views of *Wide Awake* than it is now committed to the views of any of the assorted and sometimes controversial groups already receiving funds.

The Court in *Widmar* also made the point that: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. There is no reason to believe that students at the University of Virginia are any more impressionable or any less astute than students at the University of Missouri. They, too, would know that enabling the students of *Wide Awake* to print their views, under a content-neutral policy, would not represent an official endorsement of those views.

The Rector and Visitors' fear of an apparent endorsement is even more unreasonable in light of the emphatic disclaimer they *already* require from all student groups, including *Wide Awake*. In order to obtain *any* benefits

from the University, including the use of meeting rooms and office space, a student organization must execute a University-drafted contract containing the following declaration:

> The University is . . . willing to provide certain benefits . . . , but those benefits should not be misinterpreted as meaning . . . that the University approves of the organizations' goals or activities.

J.A. at 26.

The contract also requires the student group to include the following statement (or another similar statement approved in advance by the University) in the group's letters, contracts, publications and other such written materials:

> "Although this organization has members who are [University] students . . . , the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions."

J.A. at 28.

In keeping with this obligation, the funded student groups print a disclaimer on their publications. *Wide Awake* prints the required disclaimer, too. Since these narrowly-tailored steps are apparently sufficient for the Rector and Visitors to rest easily about the publications they already fund, they should not lose any sleep over *Wide Awake*, either.

It is also important to note, as an empirical matter, that the benefits at issue here are available to a very broad class of secular groups. In *Widmar*, the Court noted

that there were over 100 recognized student groups at the University of Missouri, and said: "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274 (citations omitted). Similarly, there are more than 300 recognized student groups at the University of Virginia, including more than 100 groups that receive funding and about 17 religious ones that do not. Also significant are the 15 non-religious publications on the Grounds that are funded by the SAF.[10] The fact that SAF monies are available to so broad a spectrum of groups confirms that a content-neutral policy would have a primarily secular effect.[11]

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[10] In addition, there is *Al Salam*, a publication of the Muslim Student Association, a group the Rector and Visitors prefer to describe as *cultural* rather than religious.

[11] *Widmar's* reliance on the distribution of benefits was not new. Repeatedly, when this Court has struck down facially-neutral state statutes to aid non-public schools, it has taken pains to note that the beneficiaries of those funding schemes were almost exclusively religious. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (96% of non-public school students attended church-related schools.) *See also Sloan v. Lemon*, 413 U.S. 825, 830 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 (1973) (approximately 85% of the non-public schools were church affiliated, and "all or practically all" of the schools entitled to receive certain grants were related to the Roman Catholic Church and taught religious doctrine to some degree); *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) ("[O]f the 1,320 nonpublic schools . . . that . . . qualify for aid . . . , more than 75% are church-related or religiously affiliated . . . . "); *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (of 720 chartered nonpublic schools, all but 29 were sectarian, and more than 92 % of the nonpublic school students attended schools of one particular denomination).

Statistical effects lopsidedly in favor of sectarian institutions are not, however, the only distinction between the case at bar and the *Lemon* line of cases in which private school funding statutes were invalidated. In those cases, the financial benefits at issue were used to support various *doctrinally exclusive enclaves* in which particular sectarian viewpoints were taught to school children, who were "captive audiences" *isolated from competing views supported by comparable funding*. By contrast, if the University adopted a content-neutral policy for funding student publications, it would not be supporting *any* doctrinally exclusive enclave, especially since these students are adults – not impressionable children – and since no student group could maintain a monopoly position on the Grounds. Instead, such a policy would help create a University-wide marketplace of ideas in which no idea would be favored by the University over any other.[12] The only thing favored would be a level playing field in which all would be encouraged to profess and, by argument, maintain their opinions.

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[12] In another context, the University might legitimately reach the conclusion that some ideas are, as an academic matter, more worthy of support than others. What this case is about, however, is not the rigorous business of academics, but the more hurly-burly, extra-curricula world of student self-expression in which no one pretends that academic excellence is a prerequisite to participation. Moreover, even in those circumstances where the University must make academic value judgments, it is certainly not *required* by the Establishment Clause to treat religious concepts as unworthy of support or unrelated to its secular educational purpose. For example, the University may and, in fact, does maintain a Department of Religious Studies.

C. The Distinction Between Money And Facilities Is A Mirage.

Faced with the irresistible logic of *Widmar*, the Rector and Visitors have tried to construct a final defensive perimeter out of the fact that the case at bar involves the expenditure of money while *Widmar* involved a temporary use of facilities. The argument seems to be that providing benefits to religious groups is unconstitutional whenever additional dollars must be spent to confer those benefits. The argument is meritless for at least three reasons.

First, the Court in *Widmar* did not rely on a distinction between money and facilities. On the contrary, in finding no unconstitutional advancement of religion, the Court spoke in terms broad enough to encompass both kinds of resources:

> If the Establishment Clause barred the extension of *general benefits* to religious groups, "a church could not be protected by the police and fire department, or have its public sidewalk kept in repair."

Widmar, 454 U.S. at 274-275 (emphasis added) (citations omitted).

The public services cited by the Court do not come cheaply. Indeed, significant additional expenditures can be incurred in bringing a synagogue vandal to justice, extinguishing a church fire or repairing a sidewalk in front of a house of worship. Thus, the constitutionality of

printing *Wide Awake* cannot turn on whether such a benefit would involve the expenditure of additional dollars.[13]

Second, the distinction between money and facilities leads to absurd differences in results. In an affidavit filed with the trial court, the Rectors and Visitors make the point that "use of computers, printers,[14] and other special equipment . . . is open to all groups which produce a publication, including *Wide Awake*." J.A. at 74. They apparently concede that such a content-neutral policy with respect to tangible facilities – including equipment – is not only compatible with the Establishment Clause but is required under *Widmar*. Suppose, then, that the University were also to *own* the photocopiers or printing presses used by student groups to mass produce their newspapers. Even under the Rector and Visitors' limited reading of *Widmar*, the University would be *required* to make those photocopiers and printing presses available on a content-neutral basis. After all, there is no perceptible constitutional distinction between preparing the first copy of a newspaper and printing multiple copies for distribution to the student body.

Under the facts of this case, of course, the University does not offer students the use of its own photocopiers or printing presses. Instead, it simply pays the bills submitted by third parties who mass produce the student newspapers on privately-owned equipment. It is on this

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[13] This is especially true given the policy of using allocated SAF monies to pay vendors, rather than paying the funds to the student groups directly.

[14] These "printers" are apparently computer printers, not printing presses.

gossamer distinction – the difference between *owning* the presses and *hiring* them – that the Rector and Visitors apparently seek to hang their case, and transform a content-neutral policy that is constitutionally *required* into one that is constitutionally *forbidden*. It is a perilous place from which to hang. The distinction has absolutely no relevance to the fundamental purposes underlying the Free Speech and Establishment Clauses.

Third, in the context of a university, the fact that students are obligated to pay the funds in question does not condemn a content-neutral policy of disbursement. In his Statute for Religious Freedom, Mr. Jefferson stated that "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. . . . " Va. Code § 57-1. Nevertheless, "our nation's universities preserve a long-standing tradition of tolerating and even encouraging the propagation of all sorts of disbelieved opinion,"[15] *Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 300, 121 L. Ed. 2d 224 (1992) (resolving the question of how to reconcile Mr. Jefferson's non-compulsion principle with the need to foster a marketplace of ideas.) Of course, student activities fees are *already* being used to fund the expression by some students of secular and anti-religious opinion with which other students strongly disagree. One solution may be to de-fund all expressions of student opinion, but this is not the only

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[15] Moreover, student activity fees are no more compulsory that the tuition that students pay; both are contractual obligations voluntarily undertaken by students when they accept offers of admission to the University.

solution the Constitution permits. In the context of a university community, where the marketplace of ideas is of paramount importance, using student fees for student publications, if carried out in a content-neutral manner, does not support the *propagation* – or sponsorship – of ideas, but rather the *exchange* of ideas. Of course, exchange may degenerate into *de facto* sponsorship if some students are excluded from funding because of the content of their ideas. Indeed, this is precisely the unconstitutional condition the Commonwealth seeks to correct and which the Rector and Visitors have created by their current discriminatory policy.

D. A Content-Neutral Policy Avoids Entanglement; Discrimination Creates It.

Under the third prong of *Lemon*, a government policy touching upon religion must avoid excessive entanglement with religion. In explaining why it thought that funding of *Wide Awake* would lead to such entanglement, the Fourth Circuit largely repeated its assumption that such support would constitute government endorsement. 18 F.3d at 286. As the Commonwealth has shown, this assumption is false. *See* Part B. Moreover, given the SAF payment system, by which funds are not given directly to students groups, but are paid to third party vendors upon the presentation of invoices, there is no danger of the kind of entangling "state inspection" and "surveillance" that concerned this Court in *Lemon*. *See* 403 U.S. at 620. In short, the content-neutral funding policy sought by the Commonwealth carries little or no risk of entanglement.

On the other hand, the discriminatory policy of the Rector and Visitors has already entangled the University in a series of highly arbitrary and potentially divisive decisions that no agency of government has any business making. In *Widmar*, this Court made the following observation about the University of Missouri:

> [T]he University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11.

This prediction has been borne out at the University of Virginia by the history of its dealings with the Muslim Student Union ("MSA") and a gospel choir known as "Black Voices." While *Wide Awake*, a Christian publication, has been denied funding on the theory that it is religious, the Muslim group has been granted funding on the theory that it is a "cultural" organization. According to the Rector and Visitors, an organization is "cultural" if it is "primarily concerned with studying, promoting, and/or expressing racial, ethnic, or affinity group traditions, social forms, art and/or tastes." J.A. at 90. Culture and religion are, of course, not mutually exclusive. Indeed, religious belief can be the dominant feature of a cultural tradition. As Justice Robert Jackson observed in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 236

(1948), "nearly everything in our culture worth transmitting, everything that gives meaning to life, is saturated with religious influences."

The central if not the only unifying tradition of Muslim culture(s) is its belief in Islam.[16] This seems to make the MSA a *religious* organization, especially since its stated purpose is "to aid Muslim students during their stay at the University and to *promote a better understanding of Islam to the University community.*"[17] J.A. at 92. (Emphasis added). This statement is strikingly similar to the purposes of *Wide Awake* as stated in its constitution: (1) "publish[ing] a magazine of philosophical and religious expression"; (2) *"facilitat[ing] discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"*; and (3) provid[ing] a unifying focus for Christians of multicultural backgrounds." J.A. at 67. (Emphasis added). By what theory of the Constitution do the Rectors and Visitors presume to aid Muslims in

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[16] Islam is a world religion whose affirmation and creed is summarized in the Shahadah: "There is no God but Allah and Mohammed is His prophet." *See Concise Encyclopedia of Islam* 359 (Cyril Glassé Harper and Row Publishers, Inc., San Francisco 1989). Islam is composed of different sects and spans many diverse cultures, including the cultures of Bosnia, Turkey, the Arab states, Iran, Pakistan, Bangladesh, the Philippines, China and downtown Detroit. It makes no more sense to speak of a single Muslim culture than to speak of a single Christian culture, given the diversity, say, between a Parisian Catholic and an Amazon Indian baptized by Methodist missionaries.

[17] One MSA activity, cited by its President as an example of its work, was to sponsor a speaker on the *Western Misconceptions About Islam*, while another MSA activity is to publish its newspaper, *Al Salam*.

explaining their faith to the University community, while denying such aid to Christians who wish to explain theirs? Do the Rector and Visitors believe that Christianity, being a faith more familiar to these shores, is already well-enough understood? It is not government's business to make such judgments.

The University's present entanglement with religion is further shown by its dealings with "Black Voices." In 1990-91, the main objective of "Black Voices" was to carry "gospel and contemporary religious music . . . into the university and residential communities." J.A. at 78. Surely, a *gospel* choir must be a religious group, but the University preferred to call it "cultural" and gave it funding. Even so, at the end of the school year, when the members of "Black Voices" began to pray at choir practice and to encourage each other to be models of faith, it then became a "religious activity" and lost its eligibility for funding. J.A. at 73, 76-77. Presumably, the Rector and Visitors would not de-fund a group simply because it said grace at its annual banquet, or de-fund the football team because it prayed before a big game; but, when does a little prayer become too much prayer? And, by what Orwellian theory of the Constitution do the Rector and Visitors purport to monitor who prays, or how long and how often?

In sum, the *de facto* policy of the Rector and Visitors seems to be a mish-mash of rules, exceptions and exceptions to the exceptions. Student publications are eligible for funding, *unless* they are excessively religious. *But*, religious expression may *still* be eligible for funding when it is undertaken by what is deemed a "racial, ethnic or affinity group," though *not* when undertaken by a

culturally cosmopolitan group. *But*, even "racial, ethnic or affinity groups" must not engage in too much prayer at their meetings, or they will risk losing funds for their public activities. Trying to make these Alice-in-Wonderland distinctions is entanglement of the worst sort. It cannot be what Mr. Jefferson had in mind when he wrote the Virginia Statute for Religious Freedom or when he founded the University of Virginia.

CONCLUSION

For the reasons given herein, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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